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8 Group, LLC erroneously sued herein as Affliction  
9 Clothing and Affliction Entertainment, LLC

10 **UNITED STATES DISTRICT COURT**  
11 **CENTRAL DISTRICT OF CALIFORNIA**

12 FEDOR EMELIANENKO, an  
13 individual; M-1 NEDERLAND b.v.,  
14 a Dutch limited liability company,

15 Plaintiffs,

16 vs.  
17

18 AFFLICTION CLOTHING, a  
19 California business entity, form  
20 unknown; AFFLICTION  
21 ENTERTAINMENT, LLC, a  
22 California limited liability company,  
23 and DOES 1 through 50, inclusive,

24 Defendants,

Case No.: CV09-07865 MMM (MLGx)

**NOTICE OF MOTION AND MOTION  
TO DISMISS COMPLAINT**

**Date: January 25, 2010**

**Time: 10:00 a.m.**

**Courtroom: 780**

**Judge: Margaret M. Morrow**

25 **NOTICE OF MOTION AND MOTION**

26 **TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:**

27 PLEASE TAKE NOTICE that on January 25, 2010 at 10:00 a.m., or as soon  
28 thereafter as the matter may be heard in the above-entitled Court located at 255 East

1 Temple Street, Los Angeles California 90012, Defendant Affliction Entertainment  
2 Group, LLC, erroneously sued herein as Affliction Clothing (hereinafter “Defendant”)  
3 will and hereby does, move pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the Complaint  
4 against Defendant by Plaintiffs Fedor Emelianenko and M-1 Nederland b.v. (collectively  
5 “Plaintiffs”) on the grounds that the first through fourth causes of action of the  
6 Complaint fail to state a claim against Defendant upon which relief can be granted.

7 Defendant’s motion is based on this Notice of Motion; the attached memorandum  
8 of Points and Authorities; the Complaint; all other matters of which the Court may take  
9 judicial notice; other papers on file in this action; and such further evidence and  
10 arguments as may be presented at or before the hearing.

## 11 **MEMORANDUM OF POINTS AND AUTHORTIES**

### 12 **I. PRELIMINARY STATEMENT**

13 Plaintiffs Fedor Emelianenko and M-1 Nederland b.v. (hereinafter collectively  
14 “Plaintiffs”) in their complaint (hereinafter “Complaint”) claim that Defendants  
15 Affliction Clothing and Affliction Entertainment, LLC have breached the contracts that  
16 Defendants had with both Mr. Emelianenko and M-1 Nederland. Plaintiffs have sued the  
17 two above entities. Mr. Emelianenko entered into the Fight Agreement with Affliction  
18 Promotions, Inc. dated April 14, 2008 (hereinafter “Fight Agreement”). M-1 Nederland  
19 entered into the Consulting Agreement with Affliction Promotions, Inc. dated April 14,  
20 2008 (hereinafter “Consulting Agreement”). Affliction Promotions, Inc., after executing  
21 the agreements, was converted-out to Affliction Promotions, LLC on May 16, 2008.  
22 Affliction Promotions, LLC thereafter changed its name to Affliction Entertainment,  
23 LLC on May 30, 2008. Thereafter, Affliction Entertainment, LLC assigned all rights and  
24 duties under the Fight Agreement and the Consulting Agreement to Affliction  
25 Entertainment Group, LLC, a California limited liability company in July 2008. This  
26 entity staged and promoted the two fights referenced in Plaintiffs’ complaint in which  
27 Mr. Emelianenko participated. Affliction Entertainment Group, LLC  
28 (hereinafter “Defendant”) is hereby responding to the Plaintiffs’ Complaint instead of the

1 erroneously named Affliction Clothing and Affliction Entertainment, LLC, which no  
2 longer exists.

3       Rather than attach the Fight Agreement and the Consulting Agreement (hereinafter  
4 collectively the “Agreements”) as exhibits to the Complaint, Plaintiffs claim that they  
5 could not do so for fear of violating the confidentiality provision in the Agreements.  
6 Instead, Plaintiffs claim that they have plead the essential terms of the Agreements in the  
7 Complaint. That simply is not the case.

8       Both the Fight Agreement and the Consulting Agreement contain a term provision  
9 that clearly states that the term of each contract is to terminate upon the earlier of one of  
10 two events happening. The Agreements are to end on either March 31, 2009 or upon the  
11 completion of the third bout. As Plaintiffs’ Complaint clearly illustrates, the third bout  
12 did not occur prior to the March 31, 2009. It is clear that Plaintiffs have failed to include  
13 this language as an essential term of the Agreements in the Complaint because this term  
14 establishes that both the Fight Agreement and the Consulting Agreement expired prior to  
15 any of the claimed breaches by Defendants.

16       It is basic contract law that for there to be a breach of a contract, there has to be a  
17 contract currently in force between the two parties. In this case, there is no question that  
18 the Agreements, on their own terms, expired prior to Defendants’ alleged breaches of the  
19 Agreements claimed in Plaintiffs’ Complaint. Therefore, since the Fight Agreement and  
20 the Consulting Agreement had terminated, as a matter of law, there could be no breach of  
21 the Agreements by Defendants.

22       Plaintiffs first and second causes of action are based on Defendants’ alleged  
23 breaches of the Fight Agreement and their third and fourth causes of action are based on  
24 Defendants’ alleged breaches of the Consulting Agreement. Since Plaintiffs have failed  
25 to show that Defendants breached either of the Agreements, Plaintiffs’ first through  
26 fourth causes of action should be dismissed in their entirety.

27 ///

28 ///

1           **II. SUMMARY OF ALLEGATIONS IN COMPLAINT**

2           **A. Plaintiffs' Complaint**

3           Plaintiffs have asserted seven causes of action against Defendants. The causes of  
4 action are (1) breach of the Fight Agreement; (2) breached of the implied covenant of  
5 good faith and fair dealing – Fight Agreement; (3) breach of the Consulting Agreement;  
6 (4) breach of the implied covenant of good faith and fairdealing – Consulting  
7 Agreement; (5) breach of the letter agreement; (6) declaratory relief – fight agreement;  
8 and (7) declaratory relief – consulting agreement and letter agreement. Plaintiffs have  
9 asserted the first through fourth and sixth causes of action against Affliction  
10 Entertainment, LLC and the fifth and seventh causes of action against Affliction  
11 Clothing.

12           **B. The Parties**

13           The Complaint states that Plaintiff Fedor Emelianenko is an individual who at all  
14 relevant times was a citizen and resident of the country of Russia. Complaint, ¶1. The  
15 Complaint alleges that M-1 Nederland is a limited liability company organized and  
16 existing under the laws of the Netherlands with its principal place of business in the  
17 Netherlands. Complaint, ¶2. The Complaint alleges that Affliction Clothing is a  
18 business entity, form unknown, with its principal place of business in the city of Seal  
19 Beach, California. Complaint, ¶3. The Complaint alleges that Affliction Entertainment,  
20 LLC is a limited liability company organized and existing under the laws of California.  
21 Complaint, ¶4.

22           **C. Defects in Plaintiffs' Causes of Action**

23           Plaintiffs seek redress for Defendants' alleged breach of the Fight Agreement and  
24 Consulting Agreement. Plaintiffs, however, filed this action against Defendants without  
25 sufficiently alleging the facts necessary to make their claims. In their Complaint,  
26 Plaintiffs fail to attach either the Fight Agreement or the Consulting Agreement,  
27 claiming that by doing so, they would be breaching the confidentiality provision in those  
28 agreements. Plaintiffs then claim that they have set forth the essential terms of each of

1 the Agreements. The problem with Plaintiffs' claim, however, is that it simply is not  
2 true.

3 Plaintiffs claim that the Fight Agreement would not terminate or expire until  
4 completion of the third bout. Complaint, ¶14. This simply is not true. Paragraph 1 of  
5 the Fight Agreement provides as follows:

6 “Commencing upon Fighter’s execution of this Agreement and  
7 continuing until the earlier of: (i) March 31, 2009; or (ii) conclusion of  
8 the last Bout (as more specifically defined below) in which Fighter is  
obligated to participate....” (See Declaration of Michael Bassiri, ¶2.)

9 Thus, the contract expired on March 31, 2009. Plaintiffs allege that Defendants  
10 did not breach the Fight Agreement until July 2009, approximately four months after the  
11 contract expired pursuant to its terms. Therefore, Defendants cannot be in breach of a  
12 contract that is no longer in force.

13 The same is true for the Consulting Agreement. Paragraph 1 of the Consulting  
14 Agreement provides as follows:

15 “Commencing upon M-1’s execution of this Agreement and continuing  
16 until the earlier of: (i) March 31, 2009; or (ii) conclusion of the final  
17 Fedor Bout...” (See Declaration of Michael Bassiri, ¶3.)

18 Thus, the Consulting Agreement also expired prior to the alleged breach by  
19 Defendants. Therefore, Defendants cannot be in breach of an agreement that is no longer  
20 in force.

### 21 **III. ARGUMENT**

#### 22 **A. Dismissal Is Appropriate Where Plaintiff Has Failed to State a Legally** 23 **Cognizable Claim**

24 Dismissal of a complaint for failure to state a claim under Federal Rule of Civil  
25 Procedure 12(b)(6) is warranted when the plaintiff fails to state a legally cognizable  
26 claim or can prove no set of facts in support of a claim which would entitle the plaintiff  
27 to relief. *Balistreri v. Pacifica Police Dept.*, 901 F. 2d 696, 699 (9th Cir. 1990); accord,  
28 *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). “When the

1 court acts on a defendant's motion to dismiss pursuant to Rule 12(b)(6), the court must  
2 accept as true all material allegations in the [complaint], as well as reasonable inferences  
3 to be drawn from them." *Quon v. Arch Wireless Operating Co., Inc.*, 309 F. Supp. 2d  
4 1204, 1205, n.1 (C.D. Cal. 2004) (citing *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir.  
5 1998)). However, allegations that are merely conclusory, or that are unwarranted  
6 deductions of fact or unreasonable inferences, need not be assumed to be true, and are  
7 insufficient to withstand a motion to dismiss even under liberal pleading standards. *See*  
8 *McGlinchy v. Shell Chemical Co.*, 845 F. 2d 802, 810 (9th Cir. 1988); *Epstein v. Wash*  
9 *Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996).

10 **B. The Court May Consider the Fight Agreement and Consulting**  
11 **Agreement As Part of the Motion to Dismiss**

12 Plaintiffs have failed to attach either the Fight Agreement or the Consulting  
13 Agreement to the Complaint. However, Plaintiffs reference numerous provisions from  
14 each of the Agreements. While a plaintiff is under no obligation to attach to its  
15 complaint documents upon which its action is based, a defendant may introduce certain  
16 pertinent documents if the plaintiff failed to do so. *Romani v. Shearson Lehman Hutton*,  
17 929 F.2d 875, 879 n.3 (1st Cir. 1991) (quoting 5 Charles A. Wright & Arthur R. Miller,  
18 *Federal Practice and Procedure* §1327, at 762-63 (2d ed.1990)). Documents that a  
19 defendant attaches to a motion to dismiss are considered part of the pleadings if they are  
20 referred to in the plaintiff's complaint and are central to its claim. *See Ed Miniat, Inc. v.*  
21 *Globe Life Ins. Group, Inc.*, 805 F.2d 732, 739 n. 12 (7th Cir. 1986).

22 Plaintiffs' claims are based entirely on Defendants' alleged breaches of the  
23 Agreements. As such, the Agreements are central to Plaintiffs' claims. The Court may  
24 therefore properly consider the Fight Agreement and the Consulting Agreement as part  
25 of Defendants' motion to dismiss. *See Venture Associates Corp. v. Zenith Data Systems*  
26 *Corp.*, 987 F. 2d 429 (7th Cir. 1993) (court did not err in refusing to exclude documents  
27 attached to defendant's motion to dismiss; defendant attached documents which were  
28 referred to in plaintiff's complaint, and documents were central to plaintiff's claim, as

1 they constituted core of parties' contractual relationship); *See also Wright v. Associated*  
2 *Ins. Cos. Inc.*, 29 F.3d 1244 (7th Cir. 1994) (court properly considered agreement's  
3 contents without converting motion to dismiss to motion for summary judgment where  
4 employee repeatedly quoted from and referred to agreement in his complaint).

5 Accordingly, Defendants have attached the Fight Agreement and the Consulting  
6 Agreement as exhibits to the declaration of Michael Bassiri, filed concurrently herewith.  
7 Therefore, the court should consider the Fight Agreement and the Consulting Agreement  
8 to be a part of Plaintiffs' pleadings.

9 **C. Plaintiffs' Failed to State a Claim for Relief Against Defendants for**  
10 **Breach of Contract or Breach of the Implied Covenant of Good Faith and Fair**  
11 **Dealing**

12 The statement of a cause of action for breach of contract requires a pleading of the  
13 following: (1) the contract; (2) plaintiff's performance or excuse for nonperformance;  
14 (3) defendant's breach; and (4) damage to plaintiff. *Roth v. Malson*, 67 Cal. App. 4th  
15 552, 557, 79 Cal. Rptr. 2d 226 (1998). Generally a contract remains in force until it has  
16 been terminated, either according to its terms or through the acts of the parties  
17 evidencing an abandonment. *Busch v. Globe Industries*, 200 Cal. App. 2d 315, 19 Cal.  
18 Rptr. 441(1962) Further, there can be no actual breach of a contract until the time  
19 specified in the contract for performance has arrived. *Taylor v. Johnston*, 15 Cal. 3d  
20 130, 123 Cal. Rptr. 641 (1975).

21 Under a contract giving a party an option to terminate, that party is not liable after  
22 termination for further transactions under the contract. However, obligations that have  
23 already accrued are not affected. *Merrill v. Continental Assur. Co.*, 200 Cal. App. 2d  
24 663, 670, 19 Cal. Rptr. 432 (1962). Similarly, a party who has given notice of  
25 termination because of the other party's breach may proceed to present a claim for  
26 damages by reason of the breach up to the time of termination. *B. L. Metcalf General*  
27 *Contractor, Inc. v. Earl Erne Inc.*, 212 Cal. App.2d 689, 28 Cal. Rptr. 382 (1963).  
28 Further, parties to a contract may provide therein for their respective rights and liabilities



1 in the event of the termination thereof. *Merrill*, 200 Cal. App. 2d at 670.

2 As discussed above, since the Fight Agreement and the Consulting Agreement  
3 should be considered to be part of the Plaintiffs' Complaint, the Complaint fails to state a  
4 claim upon which relief can be granted. Contrary to Plaintiffs' allegations, the Fight  
5 Agreement and the Consulting Agreement provide that the agreements were to terminate  
6 on March 31, 2009, not at the end of the third bout as Plaintiffs' allege. In the  
7 Agreements, Plaintiffs and Defendants decided that the Agreements would terminate  
8 upon the occurrence of the earlier of one of two events: either on March 31, 2009 or  
9 after the third bout was completed.

10 For purposes of a motion to dismiss for failure to state claim on which relief can  
11 be granted, if allegations of complaint are contradicted by documents made part of  
12 complaint, the document controls and the court need not accept as true allegations of the  
13 complaint. *Sazerac Co., Inc. v. Falk*, 861 F. Supp. 253 (S.D.N.Y. 1994); *See also*  
14 *Informix Software, Inc. v. Oracle Corp.*, 927 F. Supp. 1283 (N.D. Cal. 1996). Clearly,  
15 Plaintiffs' allegations in the Complaint that the Agreements would not expire until after  
16 the third bout directly contradicts the express terms of the Agreements. Therefore, the  
17 court should disregard the Plaintiffs' allegations and rely on the language in the actual  
18 Agreements.

19 Plaintiffs' allege that Defendants did not breach the Fight Agreement and the  
20 Consulting Agreement until July 2009. However, both of the Agreements expired  
21 pursuant to their terms on March 31, 2009. Plaintiffs have not alleged that either of the  
22 Agreements was amended to extend the term of the contract to include the time period  
23 where Defendants are alleged to have breached the Agreements. Therefore, at the time  
24 of the alleged breach, both the Fight Agreement and the Consulting Agreement had  
25 terminated pursuant to their terms.

26 The law is clear that a party is not liable to the other party if the contract has  
27 terminated. *See Merrill*, 200 Cal. App. 2d at 663, 670. Since the Fight Agreement and  
28 the Consulting Agreement were no longer in force at the time of the alleged breach by



1 Defendants, Defendants cannot be liable to Plaintiffs for a breach of the Agreements.  
2 Therefore, Plaintiffs have failed to state a claim upon which relief may be granted.

3 **IV. CONCLUSION**

4 For the reasons set forth above, this Court should dismiss all claims for  
5 relief against Defendants for breach of contract and breach of the implied covenant of  
6 good faith and fair dealing contained in Plaintiffs' first through fourth causes of action,  
7 with prejudice, for Plaintiffs' failure to state a claim upon which relief can be granted.

8  
9 Dated: November 6, 2009

10  
11 */s/ Michael Bassiri*

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16 Attorneys for Defendants  
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**CERTIFICATE OF CONFERENCE**

This motion is made following the conference of counsel pursuant to Local Rule 7-3 which took place on Friday, November 6, 2009 via telephone.

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 6, 2009.

s/ MICHAEL BASSIRI

MICHAEL BASSIRI

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Seal Beach, California 90740

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## **Mailing Information for a Case 2:09-cv-07865-MMM-MLG**

### **Electronic Mail Notice List**

The following are those who are currently on the list to receive e-mail notices for this case.

- **Michelle L Carder**  
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### **Manual Notice List**

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

- (No manual recipients)